

# Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

a publication of the York University Centre for Public Law and Public Policy and the Robarts Centre for Canadian Studies of York University

## SPECIAL ISSUE: SUPREME COURT OF CANADA IN 1997

### THE SUPREME COURT AND THE CHARTER: QUANTITATIVE TRENDS—CONTINUITIES AND DISCONTINUITIES

BY PETER H. RUSSELL

Statistics about courts and judges can at best give only an indication of broad trends in the work of the courts and the inclinations of judges. They certainly cannot tell us much about the major developments in the Supreme Court's constitutional jurisprudence or about the impact its decisions are having on the country. Statistics cannot even give us a very useful snapshot of one year's constitution decisions of the Supreme Court.

The statistical data provided by the organizers of this conference on 1997 Supreme Court of Canada cases involving constitutional challenges are a case in point. For my

*continued on page 62*



#### FEATURES

The Supreme Court and the *Charter*: Quantitative Trends—Continuities and Discontinuities  
by Peter H. Russell . . . . . 61

The Vagaries of Review at the Supreme Court of Canada  
by Jamie Cameron . . . . . 61

Litigation Trends in 1997 Supreme Court Jurisprudence  
by Debra M. McAllister . . . . . 68

#### ABORIGINAL RIGHTS

Recognition of Aboriginal Title  
by Peter W. Hogg . . . . . 70

Varieties of Aboriginal Rights  
by Brian Slattery . . . . . 71

Preliminary Thoughts on *Delgamuukw* and Treaty Rights  
by Shin Imai . . . . . 74

#### EQUALITY RIGHTS

A New Era of Equality Activism?  
by Bruce Ryder . . . . . 76

*Eldridge v. British Columbia*: Defining the Equality Rights of the Disabled Under the *Charter*  
by Mary Cornish & Fay Faraday . . . . . 78

The Difference Dilemma: The Supreme Court and Equality Rights in 1997  
by Robert E. Charney . . . . . 81

Looking at the Individual or the Group When Assessing Disadvantage in *Charter* Litigation  
by Raj Anand & Mohan Sharma . . . . . 85

#### DIVISION OF POWERS

Groundhog Day at the Supreme Court: The Federal Criminal Law Power Authorizes the Regulation of Toxic Substances Harmful to the Environment  
by Jean Leclair . . . . . 88

How Far Can the Court Go Too Far?  
by Andrée Lajoie . . . . . 90

#### CRIMINAL LAW

The *Charter of Rights* as a Murderer's Best Friend  
by Alan Young . . . . . 92

The Disclosure Dilemma: 1997 Decisions on Evidence  
by Diane Martin . . . . . 96

The Supreme Court of Canada's 1997 Constitutional Decisions: A Statistical Overview  
by Patrick J. Monahan . . . . . 102

### THE VAGARIES OF REVIEW AT THE SUPREME COURT OF CANADA

BY JAMIE CAMERON

#### VAGARIES

It is disheartening to watch the Supreme Court of Canada at work. For some time now, there have been complaints, some muted and some not, that the jurisprudence is confused and unpredictable, that the judges are divided, and that there are gender gaps between its seven male and two female members. Decision-making is often a riddle, because the Court can be fragmented, and can also spring unanimous decisions on unwitting academics when they least expect them.

This year "activism", which gratuitously decides an issue or notably expands judicial power, co-exists alongside "deference", where the judiciary backs away from the enforcement of rights or withdraws from an issue. In discussing that pattern, an initial caveat should be entered: labels that are based on certain assumptions about principles of constitutional interpretation are themselves somewhat unhelpful.

*continued on page 65*



money, what is really important about the Supreme Court's constitutional work in 1997 is not to be found in any of its quantitative features. The Court's most important acts of constitution-making—for that is, inescapably, what the Court does in adjudicating constitutional disputes—came in just two decisions—one on the judiciary itself, and the other on Aboriginal rights.

*The Supreme Court presided over by Chief Justice Lamer appears to be much less restrained than was the Dickson Court in deciding cases that affect the metes and bounds of the judiciary's power and the material interests of its members.*

In the four cases included in these statistical tables (see the article by Patrick Monahan at p. 102) as *Charter* challenges based on section 11(d),

the Supreme Court imposed on all jurisdictions in Canada the requirement that an independent commission play the key role in deciding on any changes in judicial remuneration. Quite unlike the other *Charter* cases included in these tables, these four were not brought before the Court by ordinary citizens trying to vindicate their rights. In fact, these cases were brought to the Supreme Court by provincial court judges objecting to the treatment of their salaries during a period of fiscal restraint. The Court's decision in these cases should be seen as an assertion of judicial power against the political branches of government. The Supreme Court presided over by Chief Justice Lamer appears to be much less restrained than was the Dickson Court in deciding cases that affect the metes and bounds of the judiciary's power and the material interests of its members.

The relative acquiescence of the media and mainstream opinion with the activism of the judicial salary cases is in marked contrast to the shocked public reaction to the Court's decision in *Delgamuukw*. This is the sin-

gle most important decision ever rendered by a common law court on the doctrine of aboriginal title. The decision significantly strengthens the legal resources of indigenous peoples—not only in Canada but around the world. While it gives real substance to native title, it also upholds the Crown's sovereign power to infringe that title. But by requiring that such infringements, unless minor, require more than consultation with native title holders, the Supreme Court in effect renews the *Proclamation of 1763* and commits contemporary Canada to following a treaty-like process in making arrangements for sharing land and jurisdiction with Aboriginal peoples whose land rights have not been extinguished.

While judicial statistics cannot tell us very much, they can tell us something—especially about continuities and discontinuities in the work of the courts and alignments among the judges. It is with an eye to long-term patterns and possible breaks in them that I look at the batch of tables presented to us. To do this, it is necessary to relate them to earlier work on quantitative

trends, namely work published by Professor Ted Morton and myself assisted by Michael Withey and Troy Riddell, and now updated by James Kelly.

*Over the last fourteen years, Charter cases have constituted just under one-quarter of the Court's business. This has meant that, in the Charter era, constitutional law has become the largest legal category on the Supreme Court's docket. The Canadian Supreme Court, however, is still far from being a "constitutional court", because constitutional cases account for less than one-half of its caseload.*

Though there are differences

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between the ways these earlier studies counted and classified *Charter* decisions, I do not think these differences are so serious as to undermine the value of comparing the results of these quantifying exercises.

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*Relying on the judiciary to settle disputes between the branches of government is as bad for the health of the body politic as relying on it to settle disputes between the levels of government.*

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First, on the quantitative importance of the *Charter of Rights* in the work of the Supreme Court, the story is one of continuity. The conference data show that, in the seven year period from 1992 to 1997 (inclusive), the Court decided 230 *Charter* cases—just over 30 per year. That is pretty close to average: since 1984, when the Court heard its first *Charter* case, it has averaged 25 *Charter* cases per year, and if one omits the first two years when *Charter* cases were just trickling in, the average *Charter* output per year is 27.5 cases. Although 1997 may seem like a lean year with just 20 *Charter* cases, this is only a reflection of a sharp drop in the total number of cases the Court decided last year.

Over the last fourteen years, *Charter* cases have constituted just under one-quarter of the Court's business. This has meant that, in the *Charter* era, constitutional law has become the largest legal category on the Supreme Court's docket. The Canadian Supreme Court, however, is still far from being a "constitutional court", because consti-

tutional cases account for less than one-half of its caseload.

The biggest change indicated by the data for these recent years is the remarkable increase in aboriginal rights cases. Aboriginal peoples are increasingly turning to litigation—not as an alternative to negotiation, but as a means of strengthening their position in political negotiations. The other development in the Court's constitutional docket, not captured by these tables, is the increase in the Court's decision making on the judicial branch of government itself. In 1997, the Court devoted more of its energy to adjudicating disputes between the branches of government than between the levels of government: besides the four cases dealing with judicial salaries, it decided important cases dealing with evidence of judicial bias and judicial-executive branch relations. Relying on the judiciary to settle disputes between the branches of government is as bad for the health of the body politic as relying on it to settle disputes between the levels of government.

Other quantitative dimensions of the Supreme Court's *Charter* work show remarkable continuity. Actions of executive branch officers, mainly the police, rather than legislation continue to be the target of just under one-half of the *Charter* challenges coming before the Court. No doubt, this reflects another enduring continuity—the fact that two-thirds of *Charter* cases involve the legal rights sections of the *Charter*. While the democratic sting in judicial review of executive acts is less pronounced than in judicial review of legislation, it should nonetheless be noted that the frequency of the Supreme Court's review of legislation is considerably higher than in *Charter* cases dealt with in the lower courts. However, it is

interesting to observe that, while overall since 1984 the success rate of *Charter* challenges to executive acts has been somewhat higher than in challenges to legislation, in the conference data on the most recent seven years the reverse has been true—a 35 percent success rate in cases challenging legislation versus just 31 percent in cases challenging administrators and the police.

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*Since 1984, the success rate for legal rights has been 31 percent as compared with only 22 percent in equality rights cases, and 20 percent in fundamental freedoms cases. . . . Charter claimants continue to have their best chance before the Supreme Court when they are claiming the protection of one of the Charter's specific legal rights.*

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Federal legislation continues to be challenged a little more frequently than provincial legislation. This is in marked contrast to the situation in the United States, where state legislation is challenged much more often than federal statutes. The reason for this is not just the greater number of states but the fact that criminal law, the main target of constitutional challenges, is essentially under state jurisdiction in the U.S. Not only is federal legislation reviewed more often in Canada, it is overturned proportionately a little more often than provincial legislation.

Aggregate success rates in

*Charter* cases coming before the Supreme Court really cannot tell us very much. The conference data show that, over the last seven years, 31 percent of the Supreme Court's *Charter* cases have resulted in wins for the *Charter* claimant. This, despite the very high rate of success reported for 1997, is very close to the overall success rate of 33 percent recorded for all *Charter* cases since 1984. But significant trends emerge only when we look at variations in success rates across the three categories of *Charter* cases that account for nine out of every ten *Charter* cases the Court hears—legal rights (sections 7 to 14), fundamental freedoms (section 2), and equality rights (section 15).

When we do this, we find in the data for recent years as in the data for all of the Court's *Charter* decisions since 1984, that success rates are significantly higher in cases involving legal rights than in the other two categories. Since 1984, the success rate for legal rights has been 31 percent as compared with only 22 percent in equality rights cases, and 20 percent in fundamental freedoms cases. The differences are narrower in the conference data for 1992-97—29 percent for legal rights versus 27 percent and 24 percent for fundamental freedoms and equality rights. But if we remove cases involving the amorphous section 7 (where many claimants try but few succeed), and section 12 (cruel and unusual punishment), the success rate in legal rights rises to over 30 percent. *Charter* claimants continue to have their best chance before the Supreme Court when they are claiming the protection of one of the *Charter's* specific legal rights.

*continued on page 64*



*Since the Court's "honeymoon" period with the Charter came to an end in 1985, the Charter has tended to divide it much more than any other part of its docket. Our study of its first decade of Charter decisions showed that, while the Court was unanimous in 82 percent of its non-Charter decisions, in Charter cases its unanimity rate fell to 59 percent. The conference data show an even lower unanimity rate, just 39 percent, for the last four years of Charter decisions.*

The relative continuity in the Supreme Court's *Charter* statistics is interesting to observe in light of the fact that it has changed from being a Court largely made up of Trudeau Government appointees to one composed almost entirely of Mulroney Government appointees. Indeed, since Justice Wilson's retirement in 1991, right up to Justice La Forest's retirement and Justice Sopinka's death in 1997, all of the Court's ordinary members have been Mulroney appointees. Only Chief Justice Lamer, whom Mulroney elevated to that position in 1990, was originally a Trudeau appointment. At least quantitatively, in terms of overall bottom-line results, the shift from a Mulroney

Court to a Trudeau Court does not indicate that the Supreme Court has become significantly more conservative or less activist. The overall success rate of *Charter* claimants in Chief Justice Lamer's court has been just 1 percent, lower than in the pre-1990 Dickson Court.

But what about divisions within the Court? Since the Court's "honeymoon" period with the *Charter* came to an end in 1985, the *Charter* has tended to divide it much more than any other part of its docket. Our study of its first decade of *Charter* decisions showed that, while the Court was unanimous in 82 percent of its non-*Charter* decisions, in *Charter* cases its unanimity rate fell to 59 percent. The conference data show an even lower unanimity rate, just 45 percent, for the last seven years of *Charter* decisions.


Though there are no doubt shifting coalitions on different issues, there is evidence of a dominant core group of five justices on the Lamer Court—the Chief Justice himself plus Justices Cory, Iacobucci, Sopinka, and Major. More often than not, these five have been on the majority side when the Court has split in *Charter* cases and they have been relatively pro-*Charter*, compared with the other four members of the Lamer Court, Justices Gonthier, La Forest, L'Heureux-Dubé, and McLachlin.

But it would be misleading to view these two groupings as ideological blocks. In earlier analyses of voting trends, we looked separately at criminal justice cases and equality cases involving the rights of women and vulnerable minorities (including cases involving language and aboriginal rights, and religious freedom claims). This analysis showed

*[I]t is evident that the two newest members of the Court, Justices Bastarache and Binnie—Prime Minister Chrétien's first Supreme Court appointments—could tip the balance of power in the Court. If one or both of them took an approach to the Charter that is significantly closer to L'Heureux-Dubé and McLachlin than to the judges they replaced, the Court could shift to the left and become more supportive of equality claims.*

that the two women justices, L'Heureux-Dubé and McLachlin, while relatively non-activist in criminal justice cases, especially L'Heureux-Dubé, were by a considerable measure the most likely of all the justices on the Lamer Court to support *Charter* claimants in cases raising issues of social and cultural equality. The two judges most likely to align with them in these cases were Chief Justice Lamer and Justice Cory. On the other hand, the two Justices who left the Court in 1997, Justices La Forest and Sopinka, though relatively pro-claimant in criminal justice cases, especially Sopinka, were at the opposite ends of the Court in equality cases.

Bearing these trends in

mind, it is evident that the two newest members of the Court, Justices Bastarache and Binnie—Prime Minister Chrétien's first Supreme Court appointments—could tip the balance of power in the Court. If one or both of them took an approach to the *Charter* that is significantly closer to L'Heureux-Dubé and McLachlin than to the judges they replaced, the Court could shift to the left and become more supportive of equality claims. So, ultimately, we do have something interesting to look for in the Supreme Court's 1998 *Charter* statistics. 

*Peter H. Russell is Professor Emeritus of Political Science at the University of Toronto.*

The papers in this special issue of *Canada Watch* were originally presented at a *Canada Watch* Conference held in Toronto on April 17, 1998. Following the Conference, the authors revised their papers for publication. Plans are now underway for next year's Conference, which will examine the Supreme Court of Canada's 1998 constitutional cases, and will be held in Toronto on April 16, 1999. A highlight of the 1999 Conference will be an analysis of the Supreme Court of Canada's August 20th decision in the *Quebec Secession Reference*.

TO OBTAIN FURTHER INFORMATION ABOUT NEXT YEAR'S CONFERENCE, PLEASE CONTACT MICHELLE MARTIN AT [MMARTIN@YORKU.CA](mailto:MMARTIN@YORKU.CA), OR BY TELEPHONE AT 416-736-2100, EXT. 5816.